

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

77-4204

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P/S

**United States Court of Appeals
For the Second Circuit**

CHI YIM WU,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITIONER'S BRIEF

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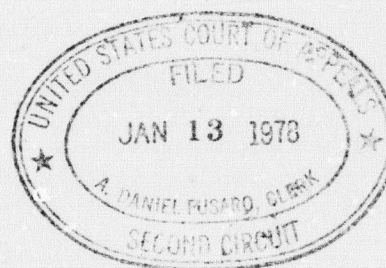
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Preliminary Statement

This case involves a petition for review of a decision of the Board of Immigration Appeals affirming the decision by an Immigration Judge at a deportation hearing held in New York City on June 6, 1976. At the deportation hearing, petitioner herein (Respondent below), was found deportable but granted voluntary departure from the United States.

Statement of Facts

Petitioner, herein, Wao Tse Chen, was arrested by officers of the Immigration and Naturalization Service, (hereafter "INS") during the evening of June 6, 1976 in the kitchen of the Twin Dragon Restaurant of White Plains Road, the Bronx, New York.

Petitioner was afforded a deportation hearing on August 4, 1976 before an Immigration Judge. Through his counsel, petitioner submitted a written motion to suppress the evidence which he alleges was illegally obtained. The motion was supported by an accompanying affidavit setting forth the following facts: that petitioner was arrested by officers of the INS during the evening of June 6, 1976 in the kitchen of the Twin Dragon Restaurant of White Plains Road, the Bronx, New York; that petitioner was merely sitting when the officers arrived, and that after immediate questioning, petitioner was then taken to Immigration headquarters where he was questioned further and signed a statement. Without

hearing the motion, the Immigration Judge commenced the proceeding. Petitioner confirmed his identity in response to the Immigration Judge's question.

As the Government's Trial Attorney commenced to ask petitioner where he was born and whether he is a national or citizen of the United States, the Immigration Judge intervened to ask them himself over the objection of the counsel.

MRS. ROHAN TO RESPONDENT:

"Mr. Chen, where were you born?"

MR. QUANE:

(simultaneous with I.J.)

"I object ..."

IMMIGRATION JUDGE:

"I'll ask the respondent questions of the Order to Show Cause."

The Immigration Judge continued to question the petitioner herein, with the expressed intention of establishing the elements of the Order to Show Cause.

IMMIGRATION JUDGE TO RESPONDENT:

Q. "Is it true, Mr. Wao Tse Chen that you are not a citizen or national of the United States?"

A. "What?"

Q. "Is it true that you are not a citizen of the United States or national?"

MR. QUANE:

"I object to the question, I would like ..."

IMMIGRATION JUDGE:

"You object to my question?"

MR. QUANE:

"Yes, you honor, it is respectfully objected"

IMMIGRATION JUDGE:

"Are you objecting to the Order to Show Cause form?"

MR. QUANE:

"No, before you get into that, your honor, I would like to submit a motion ..."

IMMIGRATION JUDGE:

"Well, let him answer. First I want to go ahead with the deportation hearing and then if you feel that you do not want to concede deportability it's one thing, but I want to establish some of the elements of the Order to Show Cause before we proceed. Maybe there is no need for your motion."

MR. QUANE: ...

A bit later in the hearing, after Counsel had indicated that petitioner was instructed to remain mute:

IMMIGRATION JUDGE:

"Before you go ahead, in view of the fact that he is remaining mute I want to establish that he is remaining mute. I have nothing other than counsel's statement here, so I am going to ask him questions in the Order to Show Cause and he may choose to answer or remain mute." (A2,3,4)

The Immigration Judge then proceeded to question the petitioner vigorously. When the petitioner's counsel twice requested a recess to confer with his client, it was flatly denied.

Q. "Mr. Wao Tse Chen, is it true that you are not a citizen or national of the United States?"

A. "I don't know."

Q. "Well, are you a citizen of the United States?"

A. "I jumped ship to the United States."

Q. "Are you a citizen of the United States, will you answer the question yes or no?"

MR. QUANE:

"Your honor, I request a brief recess."

IMMIGRATION JUDGE:

"Let him answer this question and then I'll give you a recess. This is the third time I have asked him. It is a very simple question. "(emphasis added)"

RESPONDENT:

A. "I do not have citizenship here"

IMMIGRATION JUDGE TO RESPONDENT:

Q. "Are you a ... were you born in China and are you a citizen of the Republic of China on Taiwan?"

MR. QUANE:

"Your honor, before he answers that question may I be permitted to speak to him outside?"

IMMIGRATION JUDGE:

"Well, he is remaining mute, you say, so I've got to ask him these questions to establish that he is remaining mute." (A-5)

The Judge then continued to question petitioner vigorously concerning his nationality, means of entering the United States and immigration status. The Immigration Judge then immediately made an oral finding of deportability. Only then at the request of the Trial Attorney, was an off the record conversation permitted.

After recess, the Immigration Judge denied the petitioner's motion to suppress on the ground that when a person has admitted alienage and deportability at hearing the legality of the means of obtaining the evidence has no bearing on the matter of deportation. Petitioner was granted the privilege of voluntary departure, after testimony on his eligibility therefor.¹

¹
Pursuant to 8 C.F.R. 242.17, testimony introduced to qualify for voluntary departure may not be used to establish deportability, and the Board of Immigration Appeals has so held. [See Matter of Bulos, A20 798.198, decided March 26, 1976, A 20]

Questions Presented

1. Whether, in view of all of the circumstances, the deportation hearing was so unfair as to constitute a denial of due process.

2. Whether petitioner's admissions were not freely offered and should be suppressed as improperly obtained.

Summary of Argument

1. Petitioner was, in view of all the circumstances, denied due process of law at his deportation hearing. His admission of alienage and improper immigration status was obtained directly by the Immigration Judge in violation of his right to remain silent. He was, moreover, effectively denied the assistance of his counsel, whose efforts to protect and inform his client were utterly frustrated.

2. Due to the totality of the circumstances, petitioner's admissions at hearing were neither freely nor voluntarily given and should be suppressed as inadmissible. Petitioner was unable to understand his rights without the guidance of his attorney, and responded to the Immigration Judge's questions under constructive duress.

ARGUMENT

I

IN VIEW OF THE TOTALITY OF THE CIRCUMSTANCES, THE DEPORTATION HEARING ACCORDED PETITIONER HEREIN WAS SO UNFAIR AS TO AMOUNT TO A DENIAL OF DUE PROCESS OF LAW.

The hearing was conducted in such a one sided and inquisitorial fashion that petitioner was prevented from having counsel function effectively to protect his rights. As due process of law essentially means fundamental fairness, Aquilera Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), we contend that fundamental fairness in a case such as this where a respondent has retained counsel includes exercise of the right to the advise of counsel.

In those cases involving counsel, the clear weight of authority in the Circuit courts is that counsel, once retained must be permitted to function effectively. Thus, in Piccirillo v. INS, 512 F.2d 1289, (9th Cir. 1975), a case in which a mere request for information was deemed an incomplete motion to reopen, the Court held that a denial of due process had occurred when the requests of counsel for the petitioner for information were ignored. It follows from the language of Sec. 292 of the Immigration Act, 8 USC 1362 and 8 CFR Sec. 242.10 allowing respondents to be represented by counsel at deportation hearings that such counsel was intended to function effectively in guiding his client. Indeed, in Burquez v. INS, 513 F.2d 751, 754 (10th Cir. 1975), the Tenth Circuit citing De Bernard v. Rogers, 102 U.S. App. D.C. 382, 254 F.2d 81 (1958), cert. denied 385 U.S. 816 (1958) has stated that there is a fundamental denial of due process in a deportation hearing if the absence of counsel can be characterized as prejudicial. In the instant case, petitioner was clearly denied the effective assistance of his retained counsel just as completely if he had appeared with none at all.

It has been held that denial of a continuance in a case where the alien appellant had no counsel and the purpose of the continuance was to obtain counsel constitutes denial of due process under the Fifth Amendment. Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975). We argue that this situation is similar, in that the purpose of the recess requested was not to draw out the hearing, but rather to refresh petitioner's memory of how to invoke and preserve his legal rights. We are not contending that the petitioner needed his counsel to invoke the Fifth Amendment, which is clearly a personal right and must be asserted in the face of each question. Rather, we do contend that petitioner was under considerable stress, that he knew little about his rights under the American system of jurisprudence, and that in view of these circumstances he needed his attorney to inform him of his rights and how to invoke them.

To assume that such person could protect his rights without conferring with counsel is to place unfair burden upon his memory and intelligence at a moment of extreme stress. The repeated denial of petitioner's request for a recess and the direct questioning of appellant by the Immigration Judge himself, put appellant, with no knowledge of English and no knowledge of American legal procedure, in a position where he had to rely entirely on his recollection of his attorney's prior instructions. The guarantees of the Constitution are not made solely to those with superior intellects and precise memories. They are intended to

protect all, particularly the weak or the confused. We contend that the unambiguous case law requires that when counsel is present that counsel be permitted to perform his duties of advising and guiding his client. Denial of counsel's request for a recess constituted most important single element in the denial of due process which took place. As the following colloquy shows, the Immigration Judge expressly conditioned granting a recess upon obtaining an answer from petitioner:

MR. QUANE:

"Your honor, I request a brief recess."

IMMIGRATION JUDGE:

"Let him answer this question and then I'll give you a recess. This is the third time I have asked him. It is a very simple question" (A 5) [Emphasis added]

Petitioner contends that this denial capriciously deprived him of a critical Constitutional right. Counsel obviously intended to instruct his client in how to preserve and assert his rights. Such a recess need only have taken a few moments of time off the record. The record indicates that subsequent to obtaining the desired admissions, the Immigration Judge allowed a break on the Government's motion. This indicates the arbitrariness of the previous denial. We contend that the Immigration Judge's conduct, by interposing a barrier between attorney and client when his rights were at stake, constituted a flagrant abuse of discretion amounting to denial of due process of law.

We argue that the only grounds on which the Immigration Judge could find the petitioner deportable and deny the written motion to suppress, were the involuntary and virtually coerced admissions of the petitioner in response to questions posed by the Immigration Judge himself concerning alienage and immigration status. It is now an undeniable that aliens are entitled to due process of law under the Fifth Amendment, United States ex rel Bilokumsky v. Tod, 263 U.S. 149 (1923); Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445 (1950); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962); Valeros v. INS, 387 F.2d 921 (7th Cir. 1967). It is also well established that a litigant in an action cannot be compelled to become a witness against himself in a civil action concerning the violation of Congressional statutes. Kastigar v. United States, 406 U.S. 441 (1972).

Petitioner's efforts to remain silent were rooted both in an attempt to preserve his Fourth Amendment rights and to avoid the possibility of admitting to a crime. As a means of preserving his rights under the Fourth Amendment, petitioner chose to remain silent, so that the INS would have to show his deportability by lawful evidence obtained independently of any tainted procedure. Cf. Ojedas-Vinalas, *infra*. Moreover, as an admission to any of the charges contained in the Order to Show Cause could conceivably have involved the petitioner in admitting to a criminal violation he attempted to remain silent. For example, I & N Act Sec. 275, 8 USC 1325 (1970) provides that various forms of illegal entry into

2.

Ojedas-Vinalas v. INS, 523 F.2d 286 (2d Cir. 1975)

the United States are criminal acts. These include: entering at any other time or place than as designated by the Immigration Service, entry without inspection by the INS, and obtaining entry into the United States by willfully misrepresenting or concealing a material fact on an official form or to an officer of the INS. I & N Act Sec. 275 provides that these are classified as misdemeanors in cases of first conviction and carry with them a maximum penalty of a \$500 fine and six months imprisonment. A second offense is classified as a felony and carries a maximum penalty of a \$1,000 fine and two years imprisonment. It is well accepted that respondents may plead the Fifth Amendment in deportation proceedings, Vleros v. INS, 387 F.2d 921,922 (7th Cir. 1967); Vlindes v. Holland, 245 F.2d 812 (D.C. Cir. 1957); In re Tsang, 14 I & N Dec 1 (BIA 1973). Hence, petitioner remained silent to preserve valuable rights under both the Fourth and Fifth Amendments.

Petitioner contends that under the totality of the circumstances, that the deportation hearing afforded him was so unfair as to constitute a denial of due process. As soon as petitioner identified himself and his attorney things began to go awry: in deportation proceedings, the two elements needed to prove deportability are alienage and illegal presence in or entry into the United States. Thus, when Counsel waived reading of the allegations in the Order to Show Cause, the following colloquy took place:

IMMIGRATION JUDGE:

"All right, you may proceed, Mrs. Rohan."

MRS. ROHAN TO RESPONDENT:

Q. "Mr. Chen, where were you born?"

MR. QUANE:

(simultaneous with I.J.)

"I object ..."

IMMIGRATION JUDGE:

"I'll ask the respondent questions on the Order to Show Cause."

IMMIGRATION JUDGE TO RESPONDENT:

Q. "Is it true, Mr. Wao Tse Chen that you are not a citizen or national of the United States?"

A. "What?"

Q. "Is it true that you are not a citizen of the United States or national?"

In short, the Immigration Judge began to interrogate the petitioner over the repeated objections of counsel.

MR. QUANE:

"I object to the question. I would like ..."

IMMIGRATION JUDGE:

"You object to my question?"

MR. QUANE:

"Yes, your honor, it is respectfully objected." (A2, 3)

It becomes clear that at this stage in the proceedings that the objections of counsel to attempt to have petitioner respond to questions concerning his alienage and immigration status would be ignored. In addition, the transcript clearly and unambiguously shows how often the petitioner's attorney was interrupted by the Immigration Judge while he was placing his objections in the record. These interruptions constituted an integral part of the effective denial of counsel which occurred in this hearing. Moreover, as counsel continued to offer his motion to suppress, the following exchange occurred:

IMMIGRATION JUDGE:

"Are you objecting to the Order to Show Cause form?"

MR. QUANE:

"No, before you get into that, your honor, I would like to submit a motion ..."

IMMIGRATION JUDGE:

"Well, let him answer. First I want to go ahead with

the deportation hearing and then if you feel that you do not want to concede deportability it's one thing, but I want to establish some of the elements of the Order to Show Cause before we proceed. Maybe there is no need for your motion!"

MR. QUANE: ...

When the Immigration Judge was informed by counsel that petitioner was instructed to remain mute, he again decided to take over from the government's trial attorney:

IMMIGRATION JUDGE:

"Before you go ahead, in view of the fact that he is remaining mute I want to establish that he is remaining mute. I have nothing other than counsel's statement here, so I am going to ask him questions in the Order to Show Cause and he may choose to answer or remain mute!"

IMMIGRATION JUDGE TO RESPONDENT:

Q. "Mr. Wao Tse Chen, is it true that you are not a citizen or national of the United States?"

A. "I don't know!"

Q. "Well, are you a citizen of the United States?"

A. "I jumped ship to the United States!"

Q. "Are you a citizen of the United States, will you answer the question yes or no?"

MR. QUANE:

"Your honor, I request a brief recess!"

IMMIGRATION JUDGE:

"Let him answer this question and then I'll give you a recess. This is the third time I have asked him. It is a very simple question!"
(A 3,4,5,)

At this point, a recess was made conditional upon the petitioner's affirmative response to a question which would directly lead to

denial of petitioner's written motion to suppress and to his order of deportation.

From this last colloquy, it is clear that petitioner, a person unfamiliar with both the English language and the American legal system, was not answering voluntarily nor allowed the proper guidance of counsel. Confused and pressed by both the Immigration Judge and the government's trial attorney, petitioner was refused the opportunity to confer with his counsel at a crucial stage in the proceeding. Over the counsel's renewed objection, the Judge continued to question petitioner and to deny counsel's fully justified request for a brief recess. Then in, short order, petitioner was forced to admit alienage and irregular immigration status, found deportable in consequence, and his Fourth Amendment motion to suppress denied despite the fact that these admissions were obtained in an inherently coercive manner violative of petitioner's obvious efforts to plead the Fifth Amendment.

As a result, petitioner contends that the conduct of his deportation hearing was so unfair as to constitute a denial of due process of law under the Fifth Amendment. It is by now axiomatic that the opportunity to heard before a fair tribunal is basic to preservation of litigants' Constitutional rights and that even the probability of unfairness should be avoided Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975). We respectfully assert that petitioner was denied this fundamental opportunity.

Petitioner attempted to assert his right to remain silent under the Fifth Amendment in this hearing. However, as we have seen, in view of the totality of the circumstances, he was denied both the right to remain silent and the right to assistance of counsel. At each point, as the petitioner's counsel sought to protect his client's rights, counsel was overridden and the petitioner was denied the right to consult with him. We cite as a particular example, the Immigration Judge's statement "... I want to establish some of the elements of the Order to Show Cause before we proceed." (A 3)

We submit that it was an abuse of discretion and a gross error of law to compel a defendant to answer questions which might tend to incriminate him and to effectively cut petitioner off from his retained counsel. Petitioner was entitled to a fair hearing under the due process clause of the Fifth Amendment, Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953); Wong Yang Sung v. McGrath, *supra* 50; United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). The sudden transition from questioning by the Trial Attorney to participation by the Immigration Judge would take most individuals off guard. We argue that this would be particularly true in these circumstances where petitioner was in effect cut off from his attorney and faced with the full unshielded authority of the Judge. Standards of fundamental fairness indicate here, as well, that official conduct was grossly improper. Cf. Bong Youn Choy v. Barber, 279 F.2d 642 (9Cir. 1960).

Petitioner contends that through denial of the effective assistance of counsel and the virtual replacement of the Trial Attorney by the Immigration Judge his rights to due process of law under the Constitution were violated.

II

PETITIONER'S ADMISSIONS WERE NEITHER FREELY NOR VOLUNTARILY GIVEN AND SHOULD BE SUPPRESSED AS ILLEGALLY OBTAINED. At the outset, we wish to note that we are not arguing for suppression of the whole transcript and voiding of the entire proceeding, but only those portions tainted by evidence obtained in violation of petitioner's Constitutional rights. What we are asserting is that all evidence which is improperly obtained must be suppressed; that it may not be lawfully used in order to establish a person's alienage and deportability from the United States. Unlike the petitioners in Avila-Gallegos v. INS, 252 F.2d 286 (2nd Cir. 1975) and Ojedas-Vinalas v. INS, 523 F.2d 666 (2d Cir. 1975), we do not contend that all testimony from the entire deportation hearing should be suppressed. Rather, we request only the suppression of that evidence which was obtained in a manner violative of the protections extended by the Constitution.

Petitioners in Avila-Gallegos v. INS, supra, Ojedas-Vinalas v. INS, supra, and Katris v. INS, 562 F.2d 866 (2d Cir. 1977), having freely given testimony at their deportation hearings then sought to invalidate the orders of deportation on the grounds that service misconduct voided all subsequent proceedings. In the

instant case, however, the evidence was obtained through gross legal error on the part of the Immigration Judge. [Additionally, evidence of alienage, if any, arising during an application for voluntary departure, pursuant to 8 C.F.R. 242.17, cannot be used to establish deportability, and the Board of Immigration Appeals has so held (See Matter of Bulos, supra,) In that Avila-Gallegos supra, Ojedas-Vinalas, supra, and Katris, supra, turn on the concept of "freely offered testimony" at a deportation hearing, it is clear that there can be hearing testimony which is not offered "freely" or voluntarily. There was no evidence "freely offered" at the hearing herein which could constitute independent evidence of alienage and deportability, and the only evidence sought to be suppressed was the evidence obtained in violation of petitioner's rights.

Brignoni-Ponce, supra, and Illinois Migrant Council v. Philliod, supra, explicitly apply the protections of the Fourt Amendment to Immigration Proceedings. In Illinois Migrant Council v. Pilliod, supra the Court specifically stated:

"Were this a criminal case or a deportation proceeding, (as all of the reported cases in this area have been), the decisional process would be completed. Any evidence -- tangible or testimonial (But see, Brignoni-Ponce, supra at ----, 42, 95 S.Ct. at 2577) -- derived from the obviously unlawful stops ... would be ordered suppressed. But this is not a criminal case or deportation proceeding in which retrospective examination is made of alleged official misconduct and in which the imperfect and frustrating but nonetheless limited remedy of suppression is invoked." 398 F.Supp. at 898

It is now well established that the same exclusionary rule which applies to criminal proceedings also applies to deportation proceedings. Yan Sang Kwai v. INS, 133 U & S. App. D.C. 369, 411 F.2d 683, 694 (D.C. Cir.) cert. denied, 396 U.S. 877 (1969); Illinois Migrant Council v. Pilliod, supra, 398 F. Supp. at 897-98; United States v. Wong Quong Wong, 94 Fed. 832 (D.Vt. 1899). See also Bong Youn Chou v. Barber, 279 F.2d 646 (9th Cir. 1960); Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966); La Franca v. INS, 413 F.2d 586 (2d Cir. 1969); Cheung Tin Wong v. INS, 152 U.S. App. D.C. 66, 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 144 U.S. App. D. C. 147, 445, F.2d 217 (D.C. 1971) cert. denied 404 U.S. 864 (1971).

The rationale supporting the application of the suppression rule to deportation proceedings is clear: "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. United States ex rel Mezei, 345 U.S. 206, 212 (1953). The Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), expressly held that "due Process of law" includes the right to protection against unreasonable searches and seizures, enforced by means of exclusion from the illegally seized evidence. The Mapp decision unquestionably stands for the proposition that the traditional standards of fairness encompassed in due process of law include the exclusionary rule for the enforcement of the Fourth Amendment.

In United States ex rel Bilokumsky v. Todd, 263 U.S. 129, 158 (1923), although the Court held that the involved alien's confession was not coerced, it clearly indicated that it would not

uphold a deportation proceeding lacking an element essential to due process of law. There is now no question that present day concepts of due process of law clearly include the Fourth Amendment exclusionary rule.

Directly on point is a group of cases in the District of Columbia Circuit, Yan Sang Kwai v. INS, supra; Au Yi Lau v. INS, supra; Cheung Tin Wong v. INS, supra. In all of these cases, the Court found the arrests in question to be proper only after a lengthy analysis of the record. Clearly, the Court considered that illegally seized evidence would not be admissible, because if it did not hold such view, there would be no purpose in its determining on a case by case basis whether the stops and arrest by INS agents were lawful. It is especially clear that the Court proceeded on that basis in Cheung Tin Wong, supra, since the Court expressly found it necessary to reserve decision on the question of whether other documentary evidence, unconnected to an illegal arrest could be used against an alien. 468 F.2d at 1124.

The Board of Immigration Appeals has recognized that illegally obtained evidence must be suppressed at a deportation hearing, and in the same decision has loosely formulated a procedure for obtaining a ruling on the admissibility of illegally obtained evidence. In Matter of Tang, Int. Dec. 2080, 13 INS 601 (1971), the Board explained its procedure in the following language:

"One who raised the claim must come forward with proof establishing a prima facie case before the Service will be called upon to assume the burden of justifying the manner in which it obtained its evidence ... The reason for our rule -- one similar to that which prevails in criminal matters -- is well stated in Garcia, supra. (United States v. Garcia, 272 F. Supp. 286 (S.D.N.Y. 1967))".

In Matter of Tsang, Int. Dec. 2187 (1973) the Board cited Matter of Tang, supra, with approval, for the proposition that the rule (concerning motions to suppress) 'which has been adopted for use in deportation hearings.' The remedy of suppression of evidence is clearly available in deportation proceedings.

Petitioner has shown that in combining the functions of both judge and government trial attorney and in effect negating the presence of appellant's counsel, the Immigration Judge denied petitioner due process of law to which he was entitled. Cf. Hoberman v. Lock Haven Hospital, 377 F.Supp. 1178 (U.S.D.C. Pa. 1974). Petitioner's admissions which were made under inquisitorial conditions where he was denied a fundamentally fair hearing were neither freely nor voluntarily offered as the law requires. It is a well established principle of American law under the Fourth Amendment that confessions must be freely and voluntarily offered, Townsend v. Sain, 372 U.S. 293 (1963), Watts v. Indiana, 338 U.S. 49 (1949). Whether a confession is coerced is to be determined from the totality of the circumstances, Boulden v. Holman, 394 U.S. 478 (1969). Confessions obtained as a result of mental coercion are traditionally inadmissible, Leyra v. Denno, 347 U.S. 566 (1954) United States ex rel Burns v. La Vallee, 436 F.2d 1352 (2d Cir. 1970), cert. denied, 402 U.S. 1012 (1971).

The question in each case was whether "the defendant's will was overborn at the time he confessed". Lynum v. Illinois, 372 U.S. 528, 534 (1963). In the instant case, petitioner argues that his will was overborne by the tactics chosen by the Immigration Judge. Each attempt of petitioner's attorney to object was

disregarded, as were his requests for a recess in which to explain his rights to his client. Under the insistent, direct questioning of an Immigration Judge with a mind bent on establishing the allegations set forth in the Order to Show Cause, it was no wonder that appellant, effectively denied all access to his attorney, and in a strange land, answered the Immigration Judge's questions. We also wish to point out that no interpreter could possibly translate the interruptions of counsel nor their significance. In light of the cases holding that age, mental ability and condition of defendant are considered in determining the voluntariness of a confession, Cf. Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, 367 U.S. 433(1961); United States v. Collins, 462 F.2d 192 (2d Cir.), cert, denied, 409 U.S. 988 (1972), petitioner's admissions were clearly obtained in a manner violative of Constitutional limitations. Petitioner was sufficiently unfamiliar with English as to require an interpreter, and he was subject to an intense barrage of hostile questioning sufficient to confuse a more poised person. Nothing in the transcript shows that petitioner understood the process which was taking place. If this transcript were that of a police interrogation, it would be inadmissible; we contend that petitioner had a right to expect an equally scrupulous regard for his rights at the hands of an Immigration Judge.

CONCLUSION

Wherefore, as petitioner has demonstrated in the foregoing brief, he was denied a fair deportation hearing and his motion to

suppress unlawfully obtained evidence was prevented from having proper consideration given to it. In conclusion, his rights under the Fourth Amendment were violated as his motion to suppress unlawfully obtained evidence was not properly conducted and his Fifth Amendment due process rights were violated by the patently unfair and arbitrary manner in which the deportation hearing was conducted. Wherefore, petitioner respectfully requests that this Court reverse the decision of the Board of Immigration Appeals as a matter of law and remand this matter for a hearing de novo conducted in accordance with the alien petitioner's Constitutional rights.

Respectfully submitted,



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FRIED FRAGOMEN

AFFIDAVIT OF PERSONAL SERVICE

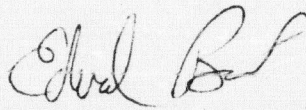
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 13 day of Jan. ,19 78 at No. 1 Saint Andrews Plaza, NYC 10007

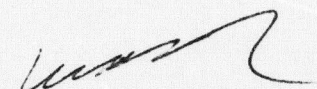
deponent served the within *BRIEF*
upon Thomas Belote, Esq.

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
13 day of Jan. 1978



Edward Bailey



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978